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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ALEJANDRO V., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO V., Defendant and Appellant.	A145197 (Contra Costa County Super. Ct. No. J15-00173)

Alejandro V., a 16-and-a-half year-old minor, appeals from a disposition order of the juvenile court that adjudged him a ward of the court after he admitted an allegation of second degree robbery, and committed him to a youthful offender treatment facility under specified terms of probation. On appeal, he challenges the electronics search condition of his probation, requiring him to submit to a warrantless search at any time of "any cell phone, or any other electronic device in his possession, including access codes."

FACTUAL AND PROCEDURAL BACKGROUND

Late one night, at 1:15 a.m., four friends were walking to a restaurant in Richmond, California and noticed four males standing by a car parked in an intersection ahead.[1] As the friends approached the intersection, two of the males threatened them

[1] Our factual summary is based upon the Contra Costa County Probation Department's dispositional report and testimony adduced at the disposition hearing.

with a gun and a taser, one demanded " '[g]ive us everything you got,' " and they proceeded to rifle through all of the friends' pockets and ended up robbing one of a set of car keys and a cell phone. Police quickly traced the car to Alejandro's mother and apprehended him that night for questioning.

Alejandro told police he was out that night driving around with his friends, intending to smoke marijuana. He claimed he had pulled over to make a phone call, and it was his friends who had gotten out of the car to commit the robbery. He also claimed he didn't know his friends were planning to do that, nor did he know they had a shotgun or taser. But Alejandro gave his cell phone to police to look at, and on it the police found a picture of a male holding a shotgun that had been taken approximately a half an hour before the robbery.

The district attorney filed a juvenile wardship petition under Welfare and Institutions Code section 602, subdivision (a), alleging three felony counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)), with enhancements for being armed with a firearm (*id.*, § 12022, subd. (a)(1)). Alejandro pleaded no contest to one count of second degree robbery, and the remaining counts were dismissed along with all firearms enhancements.

The probation department concluded Alejandro was at moderate risk of reoffending. Based on the severity of his crime, including the use of a shotgun, and other circumstances including substance abuse issues, disciplinary problems at school and poor academic performance, the probation department recommended Alejandro be committed to the Contra Costa County Youthful Offender Treatment Program (YOTP).[2]

A contested disposition hearing took place, the focus of which was Alejandro's objection that he be placed in a less restrictive youth rehabilitation facility, or in a group

[2] YOTP entails out-of-home placement in a secured facility with 20 or more other youth, where minors attend school and receive group substance abuse treatment and other counseling services. Upon release from the program, a minor typically would be transitioned back to living at home with his or her parents under more intensive monitoring than other minors placed under home supervision. It is the least restrictive youth rehabilitation facility that would accept Alejandro.

home placement. At the hearing's conclusion, the juvenile court declared Alejandro a ward of the court, ordered him committed to YOTP and imposed conditions of probation including the above-quoted electronics search condition.

This timely appeal followed.

DISCUSSION

On appeal, Alejandro challenges the electronics search condition on three grounds.[3] He contends the probation condition is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481(*Lent*). Second, he argues it is unconstitutionally vague, because it is unclear whether the requirement that he provide "access codes" means only that he must unlock the device himself to enable a search of information stored on the device; whether it means he must provide "access codes" to all of his online communications and life, including social media; or whether such online activity and communications may be accessed and searched through his devices as long as their passwords are stored on the device. Finally, he argues the condition is unconstitutionally overbroad to the extent it would permit access to all of his digital records and communications, however unrelated they may be to the reason he was placed on probation and in potential derogation of the privacy rights of third parties.

Alejandro asks the court not to strike the condition but to modify it in certain respects, largely in accordance with the remedy fashioned in *In re Malik J.* (2015) 240 Cal.App.4th 896 (*Malik J.*). His proposed modification, in effect, would (i) limit the search condition's scope to "photographs and communications stored on the device"

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[3] The wording of the condition recited in the court's written minute order differs slightly from that in the court's oral pronouncement. The written condition, a hand-written parenthetical notation, is phrased in the disjunctive. It states: "(Any electronic devices, cell phone *or* access codes)." (Italics added.) However, both Alejandro and the prosecution focus only on the condition as orally pronounced ("any cell phone, or any other electronic device in his possession, *including* access codes," italics added), and we do the same. The juvenile court's oral pronouncement is virtually identical to the wording of the condition the probation department recommended ("[s]ubmit . . . any cell phone or any other electronic device in their possession including access codes"), and the juvenile court stated it was adopting the probation department's recommendation.

only; (ii) prohibit access to remotely stored data; (iii) eliminate the requirement that Alejandro share any of his passwords, and (iv) prohibit officials from searching deleted data unless it was "readily accessible."[4]

The People, among other things, contend the *Lent* issue has been forfeited but agree the electronics search condition should be modified to remedy unconstitutional overbreadth. They propose the condition be narrowed to require Alejandro to "[s]ubmit all electronic devices under [his] control to a search of any text messages, voicemail messages, call logs, photographs, e-mail accounts and social media accounts, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified."

The law in this area is unsettled, and the legal landscape has shifted since the briefing in this case closed because the scope of a juvenile court's authority to impose an electronic search condition of probation has recently been taken up for review by the California Supreme Court. Among other things, this has resulted in the depublication of a number of court of appeal decisions relied upon by the parties here. (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428 [granting and holding pending *Ricardo P.*]; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted March 9, 2016, S232240 [same]; *In re J.R.*, review granted March 16, 2016, S232287 [same]; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted April 13, 2016, S232849 [same]; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932 [same].)

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[4] Specifically, the modification he proposes would require him to "submit any cell phone, or any other electronic device in [Alejandro's] possession, to a search of photographs and communications stored on the device. [Alejandro] must unlock the device at the officer's request to allow access to this information. The search must not require specialized equipment that would allow the officer to access information not readily accessible to the user, such as deleted information. The search must be done when the device is disconnected from the internet and cellular connection . . . ."

Our consideration of these issues is further complicated, and greatly hampered, by the fact that Alejandro raised no objection to the search condition below. As a result, we have no record of the purpose the juvenile court had in mind for imposing it, nor any indication of its intended scope apart from its text. In these circumstances, we decline to exercise our discretion to reach the merits of Alejandro's contentions.

In *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*), our Supreme Court held that a criminal defendant's failure to challenge the reasonableness of a condition of probation under *Lent* constitutes a waiver of the claim on appeal. (*Id*. at p. 230.) Among other reasons, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." (*Id*. at p. 236.) The rule of forfeiture announced in *Welch* applies to juvenile defendants too. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 883, fn. 4 (*Sheena K.*); accord, *In re P.O.* (2016) 246 Cal.App.4th 288, 294.) So we do not address Alejandro's argument that the condition should be modified on the ground it violates the *Lent* standard, including as applied by this court in *In re Erica R.* (2015) 240 Cal.App.4th 907, 912–913.

Welch's forfeiture rule "should not extend to a facial challenge to the terms of a probation condition on constitutional grounds of vagueness and overbreadth," however. (*Sheena K.*, *supra*, 40 Cal.4th at p. 887, fn. 7.) "[A] challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law. Correction on appeal of this type of facial constitutional defect in the relevant probation condition . . . may ensue from a reviewing court's unwillingness to ignore 'correctable legal error.' " (*Id.* at p. 887.) Nevertheless, *Sheena K.* cautioned that its "conclusion does not apply in every case in which a probation condition is challenged on a constitutional ground . . . 'since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." ' " (*Id.* at p. 889.) *Sheena K.* emphasized "that generally, given a meaningful opportunity, the probationer should object to a perceived facial constitutional flaw at the time a probation

condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction." (*Ibid*.)

Here, Alejandro is not challenging the facial validity of the electronics search condition on constitutional overbreadth grounds. Rather, he challenges it as unconstitutionally overbroad because it permits a search of information "however personal, however unrelated it may be to the reason [he] was placed on probation," recognizing as he must that a probation condition "must . . . be narrowly tailored to . . . a minor's reformation and rehabilitation." (See *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) Put another way, to avoid constitutional overbreadth, "[a] probation condition imposed on a minor must be narrowly tailored to both *the condition's purposes and the minor's needs*." (*In re P.O.*, *supra*, 246 Cal.App.4th at p. 297, italics added.) We decline to undertake this factual inquiry in the first instance.

Although Alejandro does not develop the argument at length, "it is apparent that [he] is not raising a pure facial challenge to the constitutionality of the probation condition that can be determined based on abstract or general legal principles," but instead invites a fact-driven inquiry based upon the specifics of his offense and his personal circumstances, amounting to an argument that "the probation condition is, *as applied to him*, unconstitutional." (*People v. Kendrick* (2014) 226 Cal.App.4th 769, 778.) And he urges the adoption of a remedy uniquely tailored to him, conceding that a warrantless search of any photographs on his electronic devices is appropriate, "[b]ecause [his] phone's camera contained evidence of the crime." So his constitutional argument "is one that cannot be resolved 'without reference to the particular sentencing record developed in the trial court [and thus does not] present a pure question of law.' " (*Id*. at p. 777, citing *Sheena K.*, *supra*, 40 Cal.4th at p. 887.)

In particular, we cannot say as a matter of law that the narrow approach undertaken in *Malik J.*, *supra*, 240 Cal.App.4th 896, is appropriate in this case. *Malik J.* held that a similarly broad electronics search condition that encompassed a juvenile's electronic devices and passwords was unconstitutionally overbroad, and substantially narrowed it on appeal (*i.e.*, by striking the requirement the juvenile provide passwords to

social media sites, and also modifying it to permit searches only of offline data and prohibiting the retrieval of deleted information "that is not readily accessible" without the use of specialized equipment). (See *id*. at pp. 900, 902–906.) But the electronics search condition in *Malik J*. was justified solely on the ground it was necessary to enable authorities to determine whether the juvenile had stolen another cell phone. (See *id*. at p. 902.) Here, though, that was not the juvenile court's stated purpose nor can we infer that it was. On the contrary, the record in this case paints a worrisome picture of a troubled youth whom the juvenile court found greatly in need of strict supervision.

What little we do know from the juvenile court's comments on the record is that it was bothered by both the severity of Alejandro's crime and his personal circumstances. The court was troubled by the level of violence and number of victims involved in the robbery, Alejandro's poor disciplinary record, and the fact that Alejandro was associating with "a bunch of hooligans" carrying weapons on the night of the robbery. It found Alejandro had "a lot of issues," not the least of which was a serious substance abuse problem. It regarded Alejandro as "completely out of control" and his parents lacking in "any control over him whatsoever." The court also was troubled by Alejandro's lack of candor to authorities, having denied knowing what was going on the night in question despite the incriminating photograph found on his cell phone (of a gun-toting male) taken shortly before the robbery. None of these factors were present in *Malik J.* In these circumstances, it's possible the juvenile court thought close monitoring of Alejandro's electronic communications and activity would be necessary to enable the probation officer "to more effectively scrutinize [his] behavior, [and] reduce[] the likelihood of further misconduct." (*In re R.V.* (2009) 171 Cal.App.4th 239, 249.)

Electronic monitoring of electronic devices, including social media accounts, is not unconstitutional as a matter of law; the question is whether the invasion of privacy occasioned by such electronics search conditions is justified by countervailing state interests on the particular facts. (See, e.g., *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175–1177 [upholding probation condition requiring monitoring of gang member's electronic devices and social media accounts]; see also *In re P.O.*, *supra*,

246 Cal.App.4th at p. 298 [upholding electronics search condition justified by need to supervise juvenile's drug use but narrowing it to apply only to data and communications "reasonably likely to reveal whether [juvenile] is boasting about drug use or otherwise involved with drugs"].) Simply put, the more severe a juvenile's needs, the more expansive the electronics search condition that may be imposed. (See *In re P.O.*, *supra*, 246 Cal.App.4th at p. 298.)

Analysis of the permissible scope of restriction on Alejandro's constitutional rights in his electronic devices, then, would require consideration of the facts and circumstances of Alejandro's offense as well as his personal circumstances, and would require us to decide whether the restriction is sufficiently tailored to the purpose the juvenile court intended it to serve. Without knowing that purpose, though, and without considering Alejandro's specific circumstances, we cannot say as a matter of law that the condition is unconstitutionally overbroad.

Compounding our reluctance to decide this question in the first instance, we cannot be confident the record in this case is fully developed. Because Alejandro did not object to the search condition when the probation department proposed it, nor even address it, there was no opportunity for the probation department to make a record further explaining why it recommended the search condition, no hearing took place, and there was no opportunity for the probation officer to conduct a follow-up investigation into Alejandro's use of electronic devices and media, if need be, to explore more fully the extent to which monitoring his usage would assist the department in supervising Alejandro on probation. By contrast, when Alejandro objected to the probation department's recommendation that he be committed to the custody of the YOTP as unduly harsh, a contested disposition hearing took place; the juvenile court even continued the hearing after receiving some evidence, ordering the probation department to go investigate other options and report back, which the probation department did. Against this backdrop, we cannot presume from a silent record Alejandro was not an active user of social media or predisposed to use his devices in connection with criminal activity (compare *In re Erica R.*, *supra*, 240 Cal.App.4th at p. 913), or that he does not

use online services or social media accounts to communicate about his drug use or other illegal activity (see *In re P.O.*, *supra*, 246 Cal.App.4th at p. 298), because those factual questions were never placed at issue. On the contrary, what little evidence there is in this record—namely, the incriminating gun photograph—shows he *is* predisposed to use electronic devices in connection with criminal activity. And then to lie about it later. So we refrain from exercising our discretion to decide this forfeited issue and second-guess the juvenile court's rulings on the basis of this record. Particularly given the gravity of the privacy invasion Alejandro contends is here implicated, combined with the serious concerns the juvenile court expressed about his actions and personal difficulties, we will not excuse his failure to object below, which might have facilitated further "development of the record and a proper exercise of discretion in the trial court." (*Welch*, *supra*, 5 Cal.4th at p. 236.)

All of that said, Alejandro concedes that a search of his electronic "photographs and communications" is appropriate, and as a practical matter the People's proposed modification is not considerably broader. Since error is partially conceded by the People, we will modify the search condition in accordance with the People's suggestion. Any contention by Alejandro that the condition, as narrowed, remains constitutionally overbroad is forfeited. This includes Alejandro's contention that the condition should be narrowed under *Malik J.* to prohibit retrieval of deleted information, and modified to restrict access to offline data only.

In light of this modification, it is unnecessary to address Alejandro's vagueness objection. We note only that it is appropriate to modify the condition to explicitly require Alejandro to share all necessary passwords, as suggested by the People, because otherwise, if expressly limited only to device passwords, a probation officer would not be able to implement the search. (See *People v. Ebertowski*, *supra*, 228 Cal.App.4th at p. 1175; *In re P.O.*, *supra*, 246 Cal.App.4th at p. 298 [requiring juvenile to "disclose to peace officers passwords necessary to gain access to [electronic] accounts" within the scope of the authorized warrantless search].) Obviously, it would be pointless to search an electronic device if its content is otherwise password-protected.

DISPOSITION

The electronics search condition is modified to require Alejandro to "submit all electronic devices under your control to a search of any text messages, voicemail messages, call logs, photographs, e-mail accounts and social media accounts, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified." As so modified, the judgment is affirmed.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

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